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HONG LEONG BANK BHD v. LING YOUNG TUEN (TETUAN LEE, LING & PARTNERS)

HIGH COURT MALAYA, KUALA LUMPUR
HARMINDAR SINGH DHALIWAL J
[CIVIL APPEAL NO: 11ANCC-57-11-2014]
B 4 JUNE 2015

CIVIL PROCEDURE: *Res judicata – Principles – Whether issues already raised in earlier proceedings – Whether res judicata applied*

C ***CIVIL PROCEDURE:*** *Judgments and orders – Garnishee order – Service of – Whether personal service on corporations should be at registered office of company – Service at bank's branch – Whether valid service – Rules of Court 2012, O. 49*

The respondent ('the plaintiff') filed a suit against the appellant bank ('the defendant') claiming the sum of RM35,450 for losses incurred. The D defendant had wrongfully and/or unlawfully allowed one Choy Yoke Ying, the judgment debtor ('JD'), to withdraw money from the defendant in breach of a garnishee order *nisi* obtained by the plaintiff against the JD. The plaintiff had served the garnishee order *nisi* on the defendant bank's Bangsar branch on 8 January 2014. The defendant applied to strike out the plaintiff's claim E which was dismissed by the Magistrate's Court. Hence, the present appeal. The grounds relied on by the defendant were: (i) the plaintiff's claim was barred by the principle of *res judicata* as the claim had already been decided in the garnishee proceedings and ought not to be relitigated; and (ii) the garnishee order *nisi* was wrongly served at the Bangsar branch instead of at the defendant's registered office, and therefore, the service could not operate F to freeze the account on the relevant date. The freezing of the account, according to the respondent, could only commence when the registered office was informed of the garnishee order *nisi*.

Held (allowing appeal with costs; striking out plaintiff's claim):

G **(1)** The duty of the court in garnishee proceedings is to determine if there is any debt due or accruing as at the date of the service of the order. In the garnishee proceedings, it was decided that there was no money in the form of RM35,450 to be garnished absolute. Hence, an order absolute was made only for the outstanding sum of RM6,754.81. Although H *res judicata* applies to instances where the issues could and should have been raised in the earlier proceedings, it was unclear whether the parties sought a trial on the issue. It would therefore be unjust to disallow the plaintiff from making a claim on the issue of wrongful release of the monies by the defendant bank. (paras 13, 14, 15 & 16)

I **(2)** It is trite law that there must be strict compliance on provisions relating to service where a particular mode for effecting service is provided. Personal service on corporations as required under O. 49 of the Rules

of Court 2012 ('ROC'), unlike individuals, could only mean serving at the registered office of the company. Hence, the service at the Bangsar branch was not a good or valid service as envisaged under the law. (paras 21 & 22)

(3) Companies, including commercial banks, would have to set up their business as required under the Companies Act 1965. Companies know that any documents, including legal documents, would have to be served at the registered office and they would have a mechanism in place at the registered office to deal with such documents especially urgent ones which required freezing of accounts under O. 49 of the ROC. Having fulfilled the requirements of a registered office under the law, it would be unfair for the defendant to have documents served at the branch and then be held accountable for any action or inaction that subsequently transpired. The service of the garnishee order *nisi* at the Bangsar branch was therefore not a good service. (paras 23 & 24)

(4) There was no obligation on the part of the defendant to freeze the accounts as required under O. 49 of the ROC *ie*, there could have been no attachment of the monies in the accounts at the Bangsar branch as at 8 January 2014. The proper action for the plaintiff was to serve the documents at the registered office of the defendant bank. Bangsar branch was therefore right in forwarding the matter to their registered office who then instructed the freezing of the accounts a day later. (para 25)

(5) It was plain and obvious that the plaintiff could not succeed as service was bad and not in accordance with the law. The facts as alluded to by the parties in relation to the service were not disputed and there was no benefit or purpose to call witnesses at a full trial. As the plaintiff's claim was obviously unsustainable, it was right and fair that the claim be struck out. (para 27)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corpn Bhd [1993] 4 CLJ 7 SC ***(refd)***

Brisbane City Council and Myer Shopping Centres Pty Ltd v. Attorney-General of Queensland [1979] AC 411 ***(refd)***

Chemfert Sdn Bhd & Anor v. Lim Hua [2010] 7 CLJ 491 CA ***(refd)***

Devan Nair v. Yong Kuan Teik [1967] 1 LNS 37 PC ***(refd)***

Galbraith v. Grimshaw & Baxter [1910] 1 KB 339 CA ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

In re Stanhope Silkstone Collieries Co (1879) 11 Ch D 160 ***(refd)***

Kekatong Sdn Bhd v. Bank Bumiputra (M) Bhd [1998] 2 CLJ 266 CA ***(refd)***

P T Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd [1957] 1 LNS 53 HC ***(refd)***

Superintendent of Pudu Prison & Ors v. Sim Kie Chan [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 SC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 4, 119(1), 350
Rules of Court 2012, O. 18 rr. 19(b), (d), O. 49 r. 3(2), O. 62 rr. 1, 3, 4

Other source(s) referred to:
Halsburys Laws of England, 4th edn, vol 17

For the appellant - Satish Nair; M/s Satish Alli & Assocs
For the respondent - Jerry Ling Young Tuen; M/s Lee Ling & Partners

[Appeal from Magistrate's Court; Civil Suit No: A72NCC-49681-07-2014]

Reported by S Barathi

JUDGMENT

Harmindar Singh Dhaliwal J:

Introduction

[1] This is an appeal from the Magistrate's Court Kuala Lumpur which had dismissed the defendant's application to strike out the plaintiff's claim under O. 18 r. 19(1)(b) and (d) of the Rules of Court 2012 ("RC 2012"). For convenience, the parties will be referred to as they were in the court of first instance.

Background Facts

[2] The plaintiff, a legal firm of advocates and solicitors, had obtained judgment against one Choy Yoke Ying ("judgment debtor"). The judgment debtor ("JD") had two bank accounts with the defendant bank at the Bangsar branch ("Bangsar branch"). On 3 January 2014, the plaintiff obtained a garnishee order *nisi* to show cause ("garnishee order *nisi*") against JD's Account No. 048000061441 in Bangsar branch (and two (2) other banks ie, OCBC Bank and CIMB Bank). On 8 January 2014, the plaintiff served the following documents by hand *vide* the plaintiff's solicitor's letter dated 6 January 2014 to the garnishee's Bangsar branch as follows:

(a) Notice of application for garnishee proceeding;

(b) Garnishee order *nisi* dated 3 January 2014; and

(c) Affidavit in support of garnishee proceeding.

[3] The second and last paragraph of the said letter of service dated 6 January 2014 provided a warning notice to the garnishee's Bangsar branch as follows:

> By this service of the Application hereof, you are to immediately freeze the account(s) of the Judgment Debtor above named until final disposal of this proceeding failing which you are liable for all loss resulting thereto.

[4] On 9 January 2014, the defendant bank wrote to plaintiff's solicitors informing them that there is a sum of RM6,754.81 in the said account of the JD and they have no objection to the said sum to be garnished and would not attend court on 15 January 2014.

[5] By a letter dated 8 January 2014 (it should read as 10 January 2014), the plaintiff's solicitors informed the defendant bank to file an affidavit on the JD's bank statement as at 3 January 2014 (date of garnishee order *nisi*) and to appear in court on 15 January 2014. Meanwhile, the hearing to show cause was adjourned to 14 February 2014 to enable the defendant bank to file an affidavit.

[6] On 29 January 2014, the defendant bank through its general manager at the bank's headquarters filed an affidavit in reply adducing the JD's bank statement in Account No. 04800061441 showing a credit balance of RM42,204.81 as at 31 December 2013 and two withdrawals of RM35,000 and RM450 on 9 January 2014 leaving a credit balance of RM6,754.81. On 14 February 2014, upon hearing the show cause proceeding, the Sessions Court made a garnishee order absolute for the sum of RM6,754.81.

[7] The plaintiff then filed the instant suit in the Magistrate's Court claiming from the defendant bank a sum of RM35,450 together with interest and costs being losses incurred by the plaintiff in the defendant bank wrongfully and/or unlawfully allowing the JD to withdraw the money in breach of the garnishee order *nisi* served on 8 January 2014. An application by the defendant bank to strike out the claim was dismissed on 29 October 2014. The defendant bank has now filed this appeal against that order.

The Appeal

[8] I do not think there is any dispute as to the plaintiff's entitlement to bring proceedings against a bank for wrongfully releasing monies that had to be preserved pending disposal of the garnishee proceedings. Order 49 r. 3(2) RC 2012 provides that the order to show cause "shall bind in the hands of the garnishee as from the service of the order on him any debt specified in the order or so much thereof as may be so specified".

[9] In this regard, *Halsburys Laws of England* (4th edn, vol. 17) provides:

> At least seven days before the time appointed by a garnishee order *nisi* for the further consideration of the matter, the order must be served on the garnishee personally and also, unless the court otherwise directs, on the judgment debtor
>
> As from the service of the garnishee order *nisi* upon the garnishee, the order operates to bind in his hands any debt specified in the order, or so much of the debt as may be specified, but it must, of course, be a debt capable of being attached at that date. Where, by the order *nisi*, all debts owing or accruing from the garnishee to the judgment debtor are attached, all the funds in the garnishee's hands belonging to the judgment

A debtor are attached, even if their amount is largely in excess of the amount of the judgment debt, unless the order is restricted in its operation to such amount as will satisfy the judgment debt.

[10] In *Galbraith v. Grimshaw & Baxter* [1910] 1 KB 339, the English Court of Appeal referred to Jessel MR's observation in *In re Stanhope Silkstone* B *Collieries Co* (1879) 11 Ch D 160 and explained the effect of a garnishee order in the following terms:

> "The attachment or garnishee order is a mode of enforcing by execution the payment of the debt in the original action; and the order that the debt be attached and that the garnishee, that is, the debtor of the original C judgment debtor, shall appear to show cause why he should not pay the debt, does not operate to give the plaintiff in the original action any security until it is served". It is plain that Jessel MR means that as soon as the order is served it does give the judgment creditor some security. It does not, it is true, operate as a transfer of the property in the debt, but it is an equitable charge on it, and the garnishee cannot pay the debt D to anyone but the garnish or without incurring the risk of having to pay it over again to the creditor.

[11] Now the defendant's grounds for contending that the plaintiff's claim ought to be struck out is two-fold. Firstly, the defendant is contending that the plaintiff's claim is barred by the principle of *res judicata* as the claim of E the plaintiff was already decided in the garnishee proceedings and ought not to be re-litigated. Secondly, the defendant argues that the garnishee *nisi* order was wrongly served at the Bangsar branch instead of the registered office and therefore such service could not operate to freeze the account on that date but the freezing could only commence when the registered office was F informed of the garnishee order *nisi.*

Res Judicata

[12] On this issue, the defendant submitted at length and sought to show that the plaintiff's claim was a non-starter because of the principle of *res* G *judicata*. It was contended that the learned Sessions Judge had only allowed the sum of RM6,754.81 to be garnished and refused to garnish further the sum of RM35,450 which has now become the subject of the present litigation. It was accordingly submitted that the plaintiff is now estopped from re-litigating the same. In this connection, the defendant relied strongly on the following authorities: *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors* H *Ltd* [1997] 2 CLJ 104; *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189; *Chemfert Sdn Bhd & Anor v. Lim Hua* [2010] 7 CLJ 491; and *Superintendent of Pudu Prison & Ors v. Sim Kie Chan* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 SC.

I **[13]** Although the arguments by the defendant seem compelling, I think execution proceedings are not always the right forum to ventilate the kind of action the plaintiff has now brought against the defendant bank. The duty of the court in garnishee proceedings is to determine if there is any debt due or accruing as at the date of the service of the order.

[14] In the garnishee proceedings in question, the learned Sessions Judge adopted a cursory approach and determined that there was no money in the form of RM35,450 to be garnished absolute. The learned judge then came to the view that the sum outstanding was only RM6,754.81 and an order absolute was made for that sum.

[15] I am not unaware of the *res judicata* principle adopted in the wider sense as explained by the Privy Council in *Brisbane City Council and Myer Shopping Centres Pty Ltd v. Attorney-General of Queensland* [1979] AC 411 in that *res judicata* also applies to instances where issues could and should have been raised in the earlier proceedings. However, that could only have been done if a trial was ordered by the learned judge on that issue but this would be limited to the case where the garnishee disputes liability to pay the debt due or claimed to be due from him to the judgment debtor. This contest will usually involve the judgment debtor as well to determine if the debt is due or accruing.

[16] In any case, it is unclear whether the parties sought for a trial on the issue. There is no record of such proceedings before the court. What is not in dispute though is that the learned Sessions Judge did not order any trial on any issue and decided the matter summarily. In all the circumstances, it would now be unjust to disallow the plaintiff from making a claim on the issue of wrongful release of the monies by the defendant bank. The plaintiff's claim could not be struck out on this ground.

Service Of Garnishee Order *Nisi*

[17] In this instance, the argument by the defendant is that the provisions relating to the service of the garnishee order *nisi* have not been complied with. The said garnishee order *nisi*, it was contended, was wrongly served at the Bangsar branch instead of the registered office of the defendant bank. Is the defendant bank right?

[18] There are several provisions in the law relating to service of documents. The starting point should be the specific provision in O. 49 r. 3 RC 2012 which sets out how the garnishee order to show cause ought to be served:

> Service and effect of order to show cause (O. 49 r.3)
>
> (1) An order under rule 1 to show cause shall, at least seven days before the time appointed thereby for the further consideration of the matter, be served -
>
> (a) on the garnishee personally; and
>
> (b) unless the Court otherwise directs, on the judgment debtor.
>
> (2) Such an order shall bind in the hands of the garnishee as from the service of the order on him any debt specified in the order or so much thereof as may be so specified.

[19] How service is to be effected personally as well as service on corporations is set out in O. 62 rr. 1, 3 and 4 RC 2012:

When personal service required (O. 62 r. 1)

(1) Any document which by virtue of these Rules is required to be served on any person need not be served personally unless the document is one which by an express provision of these Rules or by order of the Court is required to be so served.

(2) Paragraph (1) shall not affect the power of the Court under any provision of these Rules to dispense with the requirements for personal service.

(3) The service of a writ is not required where the defendant or his solicitor undertakes in writing to accept service and enter an appearance.

Personal service; How effected (O. 62 r. 3)

(1) Personal service of a document is effected by leaving a copy of the document with the person to be served and, if so requested by him at the time when it is left, showing him -

(a) In the case where the document is a writ or other originating process, the sealed copy; and

(b) in any other case, an office copy.

Service on corporation (O. 62 r. 4)

(2) (1) Where an action is against a corporation, the writ may be served-

(a) by leaving a copy of it at the registered office (if any) of the corporation;

(b) by sending a copy of it by registered post addressed to the corporation at the office, or, if there are more offices than one at the principal office of the corporation, whether such office is situated within Malaysia or elsewhere;

(c) by handing a copy of it to the secretary or to any director or other officer of the corporation; or

(d) in the case of a foreign company registered under Part XI of the Companies Act [Act 125] by handing a copy of it to, a person authorized to accept service of process on behalf of the foreign company.

(3) The rule does not restrict the operation of the provisions of any written law as to service on any particular person or authority.

(4) Where service is effected under this rule, the person served shall be entitled on demand to inspect the original writ.

[20] Although O. 62 r. 4 appears to be specific to writs, s. 350 of the Companies Act 1965 ("Companies Act"), on the other hand, is all inclusive as it refers to 'documents' which is defined in s. 4 of the Companies Act as including "summons, order and other legal process and notice and register". Section 350 reads:

Service of documents on company

350. A document may be served on a company by leaving it at or sending it by registered post to the registered office of the company.

[21] I think two observations can be made in relation to the foregoing provisions on service. Firstly, it is trite law that there must be strict compliance on provisions relating to service where a particular mode for effecting service is provided (*P T Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd* [1957] 1 LNS 53; [1958] 24 MLJ 113; *Kekatong Sdn Bhd v. Bank Bumiputra (Malaysia) Bhd* [1998] 2 CLJ 266; [1998] 2 MLJ 440 and *Devan Nair v. Yong Kuan Teik* [1967] 1 LNS 37; [1967] 1 MLJ 261).

[22] Secondly, personal service on corporations as required under O. 49 RC 2012, unlike individuals, can only mean serving at the registered office of the company. This is because s. 119(1) of the Companies Act makes it compulsory for all companies to have a registered office within Malaysia to which all communications and notices may be addressed and which shall be open and accessible to the public for not less than three hours during ordinary business hours on each day, Saturdays, weekly and public holidays excepted. This seems to suggest that service at the Bangsar branch in this case was not good or valid service as envisaged under the law.

[23] Now the plaintiff argues that the accounts sought to be garnished were at the Bangsar branch and it is only appropriate that the garnishee order *nisi* be served at the branch where the money is. Although this sounds sensible at first glance, the reality is that companies, including commercial banks, have to set up their business as required under the Companies Act. Companies know that any documents, including legal documents, will have to be served at the registered office and they would have to have a mechanism in place at the registered office to deal with such documents especially urgent ones which require freezing of accounts under O. 49.

[24] Having fulfilled the requirements of a registered office under the law, it would now be unfair for the defendant bank, or any other company for that matter, to have documents served at the branch and then be held accountable for any action or inaction that subsequently transpires. For these reasons, I am unable to accept that service of the garnishee order *nisi* at the Bangsar branch on 8 January 2014 was good service.

[25] It must follow therefore that there was no obligation on that date on the part of the defendant bank to freeze the accounts as required under O. 49. In other words, there could have been no attachment of the monies in the accounts at the Bangsar branch as at 8 January 2014. The proper thing for the plaintiff to have done was to serve such documents at the registered office of the defendant bank. The Bangsar branch was therefore quite right in forwarding the matter to their registered office who then instructed the freezing of the accounts a day later.

[26] Although striking out an action without trial seems draconian and not within the spirit of every litigant having his or her day in court, this summary procedure can be adopted in plain and obvious cases where the claim is obviously unsustainable (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36). It would be pointless and a waste of time and resources if hopeless cases are allowed to go for full trial.

[27] In the instant action, it was plain and obvious that the plaintiff cannot succeed as service was bad and not in accordance with the law. The facts as alluded to by the parties in relation to the service are not disputed. There is no benefit or purpose to calling witnesses at a full trial. As the plaintiff's claim is obviously unsustainable, it is right and fair that the claim be struck out.

Conclusion

[28] In the circumstances, and for the reasons stated, appellate intervention is warranted as the decision of the learned Magistrate cannot be sustained. Accordingly, the appeal of the defendant is allowed. It follows that the defendant is entitled to an order in terms of the application filed under O. 18 r. 19 of the RC 2012. The defendant is also entitled to global costs fixed at RM6,000 as costs in the appeal and the court below.